

## BIOCRIME – A NEW CONCEPT

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### **Abstract**

*In order to reflect the interest that human society showed to the evolution of biotechnology and biomedicine, were adopted a series of juridical instruments with universal vocation, national or international, within were consecrated principles and concepts of special importance and which are considered the base of a legal system of protection that will have to be in a continuous improvement.*

*The Convention on Human Rights and Biomedicine of 4 April 1997, also known as the “Oviedo Convention” represents the source of creative inspiration of the states internal legislation, which have adopted ratification laws on national level, based on the Convention's articles.*

*Romania is among the states which have adopted a position of recognition of the Convention through the Ratification Law no. 17/2001. Therefore, on national level were previously adopted many normative acts, having as result the harmonisation between the national and international legislation, both, the civilian and criminal law.*

*We can mention as a very important event, the adoption of the new Romanian Civil and Criminal Codes, organic laws, but also the special laws in compliance with the nature of the Oviedo's Convention articles.*

*Among the special laws, we can remind Law no. 95/2006 on healthcare reform and Law no. 39/2003 on preventing and combating organized crime.*

*The chapter “Crimes” from this special laws includes articles that incriminates human trafficking, the procurement of organs that compromise the results of forensic autopsy , organization and/or conducting removal of organs and/or tissues and/or cells of human origin for transplantation , that we can call, without any doubt, Biocrimes.*

*In the Biocrimes article presentation, we will try to define and configurate this concept. In the same time, we strongly believe that the article in question is the initial start in using this new legal term and, why not, in trying to implement a new concept and to codify this type of crimes, which may be considered the subject of a deep study of the criminal law's branch, with great importance for the development of a poorly configured legal field, of International Criminal Law.*

**Keywords:** *biocrime, Oviedo Convention, human cells trafficking, organised crime, removal of organs, transplantation, International Criminal Law.*

**1. Introduction.** The progresses in molecular biology matter, the scientific discoveries but also the technological innovation of the 20<sup>th</sup> century had a great impact and deep effects on interpersonal and social relations, and even on the economic ones. The applications of this new discoveries are revolutionary, diversified, complex and aim at the origin of life itself. Fields like health, pharmacy, criminal medicine, administration of justice, the evolution of human being are examples where biotechnologies have easily found application. Industry, agriculture, fruit growing, livestock are all fields where biotechnologies were successfully implemented, having a remarkable evolution.

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Besides these applications, there are also others who raise ethical issues and questions, that humanity still cannot answer with absolute confidence and without analysing and pondering very seriously the effects, putting in balance the benefits against the unexpected and scientific hazard. Among these, we can name assisted procreation, therapeutic and reproductive cloning, the creation of hybrids or chimeras, experiments on embryos, eugenic practices and others.

Many of these were fulfilled, becoming reality, others are at the improvement stage and the issue of their realization and application is only a matter of time. Nevertheless, the majority of the states are facing serious institutional problems, but also with a legislative gap which comes to reinforce the issue in question.

Even under considered problems solved, we find that the debate was resumed, arguments that initially were considered to be sufficiently convincing are now discussed from a new perspective and placed in the light of the scientific and interdisciplinarity multidimension, as way of study. We can give as examples some classic themes as, active euthanasia or the legitimacy of death punishment. However, with the new realities prefiguration, all this, forms an area of needed application, but also a continuous study, that of Bioethics.

## **2. Bioethics. Evolution and Concept in the main international legal instruments.**

*2.1. Definition and Concept.* Regarding bioethics there are several definitions in the specialized literature, but in this study we are going to make reference to the French Encyclopedia of Bioethics from 2002<sup>1</sup>, according to which bioethics is considered as a “multidisciplinary concern for the view and activities, whose aim is to clarify and solve the ethical issues raised by the current biomedical science and biotechnology”. It is an interdisciplinary concern, bordering the present ideologies, philosophy, theology and law.

Preoccupation about ethics, regarding biotechnology applications, occurs after the Second World War as result of the “research” carried out by the specialists in the field of biomedicine and continued after this world conflagration.

The concept of Bioethics appears in 1971 and is defined in “Bioethics: The Science of Survival” by American Van Rensselaer Potter<sup>2</sup>, who writes for the first time about Bioethics, launching a new term in the academic literature.

On several encyclopedias we will find defined the concept in a sense more or less common as “the systematic study of the human behaviour science, in the life sciences and healthcare, when this behaviour is examined in the light of the values and moral principles”<sup>3</sup>.

Values of today’s society concerning life, apparently easily noticeable, finally prove extremely difficult to be defined, delimited and especially, regulated by law, so as to ensure effective protection. It was properly considered that “the supreme value among international human rights is life”<sup>4</sup>.

The mission to identify the values of the society belongs to the legislator, who, in this area has faced some major obstacles in an attempt to regulate the new social realities caused by the progress of life sciences. This because their legal classification requires a deep comprehension of the scientific aspects. At the same time, scientists are facing problems as stringent when they have to evaluate the effects of their researches and the social impact that they are generating. Eventually, the law is the one who proclaims and protects individual and collective values, whether they are new and require identification and qualification<sup>5</sup>.

*2.2. International legal instruments in the field.* Since the early 80<sup>s</sup> last century, the

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<sup>1</sup> Nouvelle Encyclopédie de Bioéthique, De Boeck, coéditeur avec G. Hottois, 2002, ISBN 2804137120.

<sup>2</sup> Van Rensselaer Potter, *Bioethics: Bridge to the Future*, Prentice-Hall, 1971.

<sup>3</sup> W. T. Reich, *Encyclopedia of Bioethics* (5 Volume Set), published by Macmillan Publishing Company, 1995.

<sup>4</sup> C. Casabona, *Biotechnology, Law and Bioethics – Comparative perspectives*, Bruylant, Bruxelles, 1999, p. 37.

<sup>5</sup> CEDO, Streletz, Kessler, Krenz c. Germania, March 22, 2001.

Parliamentary Assembly of the Council of Europe requested that the issue of the legal, social and ethical consequences of the development of biomedical science to be treated from the perspective of human rights, thus answering to the international echoes.

Nevertheless, the analysis of the main international binding texts reveals a prudent international legislature, regarding life science approach. Thus, the Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms (hereinafter the European Convention) did not insert any specific provision. However, by an extensive interpretation, some detriment to the integrity of the person were able to fit in some circumstances, in the Articles 2 and 3 of the European Convention<sup>6</sup>. Being aware of this problem, in Article 7 of the International Covenant regarding the Civil and Political Rights states that “it is forbidden for a person to be subjected, without his consent, to medical or scientific experimentation”.

For the avoidance of the legislative gap in this area, felt by most states laws and to illustrate the interest in biomedical developments, doubled by the need for rigorous legal rules, at international and national level, were adopted specific legal instruments. The first legal instrument in the field of universal jurisdiction was adopted in 1998 – the UNESCO Declaration on the Human Genome and Human Rights . This proclaims the human genome as part of the common heritage of mankind, thus protecting the human species and raising itself as a principle the responsible scientific research, while referring to human dignity.

The European Convention on medicine and human rights<sup>7</sup>, adopted by the European Council in 1997, represents the first binding force international legal instrument in this field. The aim of the Convention is the protection of human being against forbidden scientific practices or abusive medical acts, deviant from ethical standpoint.

Through this legal instrument is protected the human being at different stages of development, from embryo to person, consecrating another very important principle, namely the preeminence of the human being.

Furthermore, the Charter of Fundamental Rights of the European Union<sup>8</sup>, which now forms part of EU primary law, expressly provides the right to physical and mental integrity of the person [Article 3, Paragraph (1)], as well as the prohibition of eugenic practices, the transformation of the human body into a source of profit and reproductive cloning [Article 3, Paragraph (2), letter b), c) and d)].

Alongside the above instruments were adopted numerous resolutions, referals and declarations of the European Council, UNESCO or European Union.

Nationally, the reaction came quickly, so there were established many national bioethics committees and other alike structures, which aimed to set some clear criterias to serve future legal regulations and, finally, the draft laws in the field.

It is worth mentioning in this regard the pioneering, achieved by the National Advisory Ethics Committee of France. The intercession of the national legislator in matters of genetics has been done in different ways, depending on the country, either by special law, such as Spain, the UK, France or by the provisions of the Criminal Code, as happened in Italy, or even by constitutional provisions, such as Switzerland and Greece.

The demonstration of the ambivalent nature of science, morally speaking, is clearly visible in the genetic experiments. The interventions on the human genome affect the integrity of the individual and may even threaten the human species. The improper use of biomedicine has as result the threaten which aim at human's life origin, especially when it is the subject of research. The natural question is what results would have this kind of improper practices in the moment that they

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<sup>6</sup> Ch. Byk, *Bioethique et Convention europeene des droits de l'homme*, in L.E. Pettiti, La Convention européenne – article par article, Dalloz, 1995, p. 101-121.

<sup>7</sup> To be seen the text in *International instruments regarding human rights*, Vol. II, Regional instruments, IRDO, V<sup>th</sup> edition, Bucharest, 2002, p. 692.

<sup>8</sup> Project of Treaty establishing a Constitution for Europe, European Convention, The Publications Office of the European Union, 2003.

interfere during the intrauterine life and which would be the modality for an effective protection of the embryo.

The main problem brought to the forefront of this research was the delimitation of the right to life boundaries. There are differences between the mentalities from different continents that are found in the American on Human Rights and the European Convention<sup>9</sup>. While the American Convention on Human Rights protects the right to life of every being “from conception” [Article 4 (3)], the European Convention speaks about the right to life of the person, not as explicit.

European Court of Human Rights (ECHR) revealed that the right to life is acquired from birth<sup>10</sup>, however the national legislators outline the view that the human being should have a certain protection between the moment of conception and the one of birth, even if embraces the Court's opinion. In this interpretation is achieved the desideratum that between these moments, however, there must be a protection and should not interfere with abusive practices.

The European Convention on Human Rights and Biomedicine<sup>11</sup>, even though admits as holder of rights only the person, confers protection also to the human being, concept used due to its general term. Thus Article 14, regarding the prohibition of sex selection, refers to “the child who will be born”. According to Article 15, the principles that govern scientific research refers to “the human being”, whereas Article 18 speaks about research on “embryos in vitro”.

The end of life issue is not addressed in the text of the Convention, but we can find references to it in the Additional Protocol regarding the transplantation of organs and human tissues.

Some contradictory reactions were due to “the new eugenic practices”, that attempts to improve the human species. These practices are designed to prevent the birth, the survival but also the reproduction of individuals suffering from various serious illnesses or disabilities through sterilization, prenatal diagnostic or by genetic tests of preconception. Arguments in support of the eugenic practices are both moral and practical, materialized in high costs of adequate medical care.

China has adopted such legislation since 1995, forcing the young couples who wish to get married to undergo to a medical test which identifies an eventually hereditary defect. In Europe, as we mentioned above, the Charter of Fundamental Rights of the European Union, prohibits eugenic practices.

Another thorny issue is represented by the cloning, classified by scientists in therapeutic and reproductive, according to the objective pursued. The international legal instruments and national legislation, forbid reproductive cloning, citing the uniqueness of the human being. Pro and cons were brought to the delight of the debates, being analyzed unprecedented and scandalous situations given by the possibility of reproduction of a deceased child, whose cells were sampled short before his death or creating a child as a potential donor for his sick brother<sup>12</sup>.

On these new techniques, it was alleged that the human genome should be especially protected, as an essential element of the heritage of humanity, being even considered a sacred element. As for the genetic inheritance of the individual, the European Convention on Biomedicine and Human Rights, extends its protection on the “next generations”, as result of the awareness of the irreversible nature of a possible mutation brought to the genetic inheritance of human being.

Article 13 of this convention illustrates a suitable logic, allowing for intervention on the human genome only for medical reasons and only if the goal is not to modify “the genome of progeny”. The European Convention on Biomedicine and Human Rights doesn't condemn the progress of biology and medicine but their improper use.

Article 15 of the Convention refers to the guarantee of respecting the human rights which only concerns the applications of science and the freedom to pursue scientific research, as proclaimed in

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<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, opened for signature on 4 November 1950, entered into force on 3 September 1953. Romania ratified the Convention and its additional Protocols through Law no. 30/1994 (Official Gazette, no. 135, 31 March 1994)

<sup>10</sup> ECHR, X c. United Kingdom, 13 May 1980, request 8416/1979.

<sup>11</sup> To be seen the text in *International instruments regarding human rights*, Vol. II, Regional instruments, IRDO, V<sup>th</sup> edition, Bucharest, 2002, p. 692.

<sup>12</sup> Le Monde, 07.01.2003, [www.lemonde.fr](http://www.lemonde.fr).

the name of progress and the right to know. The boundaries of the scientist's activity and of the genetic science applications shall be the respect for the human dignity and human rights.

Another problem related to biodiversity on bioethics and how the environment is influenced by the new researches. The Stockholm's Principles of 1972, as well as the Rio de Janeiro Declaration from 1992, both mention that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

The social debate on international level regarding the discoveries in genetics and biology, in general, should bring into attention more issues than the ones raised in this present study, because the fast evolution of life sciences does not allow us to have the claim of its final, as we are at the beginning of discoveries in this field.

The debate should have an interdisciplinary and integrative approach, so the ideological and cultural perspectives would be complementary to the social sciences, which includes also the Law, sciences that work, at the very instant with the conceptual world of values and human ideals. The advances in biomedical science as well as in technology, give rise to fundamental challenges for human daily activity and the way we think, feel and act. Thus, the essence of bioethics addresses issues of humanity as: birth and death, body and mind, health and disease, dignity and freedom etc.

We will not insist on topics of discussion such as cloning, intervention on human genome, eugenic practices, the prolongation of life, plastic surgery, ortothanasia and active euthanasia, death penalty and others, because we consider that we are now at the beginning of the era of biotechnology and we benefit only its first steps. So it will be imperative in the future, to return and re-size both conceptual and application framework, carefully assisted by bioethical criteria. Though we can conclude, on the afore mentioned analysis, asserting, without fear of being mistaken, that one of the most important international legal instrument adopted, in terms of biotechnology, is the Oviedo Convention on Human Rights and Biomedicine, adopted on 4<sup>th</sup> April 1997<sup>13</sup>.

### **3. The Oviedo Convention**

*3.1. Legal source for national legislator.* Oviedo Convention on Human Rights and Biomedicine has as purpose and object the protection of dignity and identity of all human beings and the guarantee of all people, without discrimination, the respect of integrity and other fundamental rights and freedoms with regards to the application of biology and medicine.

This international legal instrument expresses the awareness of the fast progresses in biology and medicine, with the conviction of the need to respect the human being, both as an individual person and as a member of the human species, admitting in the same time the importance of respect owed to the human dignity. By this legal instrument it is not impeded the development and progress of biology and medicine but it draws attention to the misuse of science in the field.

It is a complex text, but we can not say an exhaustive one, because the speed of moving into new achievements and discoveries in the life sciences raises reasonable questions like: "What is the attitude that should be adopted towards the proportion between the benefits of scientific research results in biotechnologies and the duty of preserving the essential features of the genome of progeny, in respect of biotic preservation for future generations".

The answer has a high degree of difficulty due to variable geometry related to the scientific research results in the field and also because of the incomplete ignorance of the effects produced, using biotechnological and biomedical practices.

Nevertheless, we can say that good faith, the respect for human rights and the prudence in the scientific applications, in a word Bioethics, should closely second the biotechnological applications and abusive biomedical practices.

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<sup>13</sup> To be seen at <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>.

Bioethics and Law together creates the necessary but still insufficient condition in terms of protection against abusive application of biology and medicine. The future will reveal us new modalities to approach the subject, but until then the legislator must fight through appropriate regulation against the risks given by the legislative gap. This is how arises the idea of a need for “legislative globalization”, as the only form of protection against abuses that can be made by experts, at feud with ethics and financed by groups of interests which operate in order to take over the political and economic supremacy, the military one and, why not, the religious one.

National legislators have found in the Oviedo Convention's text, the legal source which underline the legal system within each state profile, but this is just a start.

*3.2. Several aspects regarding the Romanian law in the field.* Romania is among the states that adopted the provisions of the Oviedo Convention through the Ratification Law no. 17/2001. Subsequently, were adopted several normative acts, to harmonize national legislation in both criminal and civil matters. Of particular importance is the adoption of the new Romanian Codes, both criminal and civil, as organic laws and also special laws in the field, which incriminates acts that affect the values promoted and proclaimed by the Oviedo Convention. Among the special laws we mention Law no. 95/2006 on Health Reform and Law no. 39/2003 on preventing and combating organized crime.

Actions such as the organization and carrying out the removal of organs, tissues and/or human cells for transplantation, under conditions other than those provided by law; the procurement of organs when the result is compromising a forensic autopsy, the human organs or tissues trafficking and others, were established as criminal offenses by the national legislator.

Given the nature of these antisocial actions and the biotic character of social values protected by national criminal law, we can entitle them without being wrong: “Biocrimes”.

*3.3. Definition of Biocrime.* We will try to define Biocrime as “that reproachful and unjustified action committed with culpability, stipulated under the criminal law, that affect the biotic essence of the human species, the human dignity, but also the respect of everybody’s integrity and other fundamental rights and freedoms, relating to the application of biology and medicine”.

This new legal term can be considered a pillar around which it can be configured an entire concept on a new type of crime that may be the subject of further study of the national criminal law niche and, why not, of the international criminal law, subject insufficiently configured and which feels the urgent need of codification and regulation, possibly a result of a joint effort of specialists in international criminal law.

## **4. Conclusions**

As we mentioned above, the legislative gap may be considered more than a risk to the security of human species, already reaching the parameters of a threat that mankind have to manage with a lot of precaution. The idea of biotic protection of humans is ancestral and the fear for human tendency to compete the Creator has been materialized in the adages of great initiates as Aristotle who was demanding that “human do not disrupt the celestial seal of the Universe, in order to avoid the risks of science to humans”.

With respect to ethical judgments, Aristotle expounds that a person should not expect more certainty in methods or results than the nature of the subject matter permits. Aristotle thought that it was possible to conduct rational research with respect to value. He saw practical science as an essentially evaluative or moral science. A practical science is ethical to the extent that it takes into account the ethical aspects of the subject being studied.

Science is the one who initially helped humans to evolve and improve their existential conditions, but as well, can be the one that due to some slippage or abusive applications, who irreversibly destroy the defining characteristics of the human species.

Bioethics is an interdisciplinary realm, where spirituality, human consciousness, morality and pragmatism, together with the avid desire of knowledge, interact and try to protect the essence of humanity. As is stated in Article 61, paragraph 2 of the present Civil Code, which entered into force on 1<sup>st</sup> of October 2011<sup>14</sup>: “*The interest and welfare of the human being shall prevail over the sole interest of society or science*” shows that the legislator does his duty and realizes the primacy that the human being must enjoy.

But we must not forget the spiritual side also, which is another way to one can reach the understanding of the need to protect the human being. The Bible wondered if “man will perish through science, when speaking of apostasy, namely the betrayal and the indignation in front of the spiritual indifference of humanity”. Therefore, spiritual carelessness may influence Bioethics, in the expected outcomes regarding its efficiency.

Thus, it is imperative that the legislative gap to be discarded from national and international laws. At an international level, there is an urgent need not only to adopt conventions that include generally valid principles, but especially legal instruments of coercion with a much stronger force. Thereby, *de lege ferenda*, should be adopted a real International Criminal Code, where biocrimes would form a special and important chapter.

Given the high level of social danger posed by the infringements brought to the biotic values of human, we believe that this codification would be more than necessary and would respond to the risks created by the legislative gap regarding the protection of human species up against the discoveries of science, as well as in front of the biomedical and biotechnological abusive applications.

The ubiquity principle of legislative protection regarding human species should not be just a faraway desideratum but an international strategy to protect the human genome, as humanity heritage, as on declarative level exist legal national or international instruments of universal jurisdiction.

This is why we consider that the term-concept of Biocrime does nothing but to facilitate future codification on international level, by categories of offences, which criminalize, and also facts that infringe the human bioethics.

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<sup>14</sup> Law no. 287/2009 regarding Civil Code was published in Official Gazette of Romania, 1<sup>st</sup> Part, no. 511 of July 24, 2009, being modified by Law no. 71/2011 for application of the Law no. 287/2009 published in Official Gazette of Romania, 1st Part, no. 409 of June 10, 2011 and consecutively rectified in Official Gazette of Romania, 1<sup>st</sup> Part, no. 427 of June 17, 2011 and in the Official Gazette of Romania, 1<sup>st</sup> Part, no. 489 from July 8, 2011.